BEFORE THE MONTANA DEPARTMENT OF LABOR AND INDUSTRY

Bryan Has The Pipe, Charging Party, vs. **Park County** and **Pete Adams**, Respondents.	HRC Case Nos. 0043010660 & 0043010729 *Final Agency Decision*

I. Procedure and Preliminary Matters

Bryan Has The Pipe filed a complaint with the Department of Labor and Industry on September 15, 2003. He charged that the respondents, Park County and Pete Adams, discriminated against him on the basis of race when they denied him the opportunity to work in the Park County facility at 414 Callender Street. He amended his charges, alleging that after the filing of his original charges the respondents, because of his race or national origin and because he filed a human rights complaint, (a) subjected him to different and less favorable treatment than white persons in investigation and charging of a criminal complaint regarding a December 7, 2003, incident and (b) subjected him to different and less favorable treatment than white persons by harassing and stalking him. On May 11, 2004, the department gave formal notice that Has The Pipe's complaint would proceed to a contested case hearing, appointing Terry Spear as hearing examiner.

The contested case hearing proceeded on September 7-10, 2004, in Livingston, Park County, Montana. Has The Pipe attended in person with his counsel, Timothy C. Kelly, Kelly Law Office. The respondents attended through Tara DePuy, designated representative for the county, and their counsel, Dee Ann G. Cooney, Utick & Grosfield. The parties agreed that the respondents did not need to be in continuous attendance throughout the hearing. Dan Baldwin, Blake Blatter, Michael Boehm, Clark Carpenter, Tara DePuy, Scott Hamilton, Mark Hartwig, Bryan Has The Pipe, Dawn Holiday, John Mathias, Nicole McClain, Darren Raney, Tami Bishop Rhodes, Ed Schilling, Gary Tanascu, Thomas Totland and Matthew Tubaugh testified in person during the hearing. The parties submitted portions of the deposition testimony of Pete Adams, Clark Carpenter, Tara DePuy, Jim Durgan, Bryan Has The Pipe, Ed Schilling and Thomas Totland.[1]

[1] Respondents submitted additional excerpts in response to Has The Pipe's rebuttal excerpts. Has The Pipe objected, and, in the alternative, offered additional excerpts, to which respondents objected. The hearing examiner now admits all of the additional excerpts.

The hearing examiner admitted Exhibits 2, 4, 5, 6, 7, 8, 11, 13, 15, 16, 17, 17-1, 17A, 17B, 18, 18A, 18B, 21, 21A, 21B, 23, 24, 26, 27, 28, 28A, 29, 30, 37, 38, 39, 40, A, B, C(a), C(b), D(a), D(b), F and G into the evidentiary record, refusing Exhibit 22.

The parties filed post hearing arguments and proposed decisions and submitted the matter for decision. A copy of the Hearings Bureau docket of this contested case proceeding accompanies this decision.

II. Issues

The issue is whether respondents discriminated against Has The Pipe (a) because of his race or national origin with regard to his working in the county courthouse for an employer under contract with the county or (b) because of his race or national origin or in retaliation for his original discrimination charges with regard to law enforcement's contacts with and actions toward him within the county. For a full statement of the issues, ***see*** "Revised Final Prehearing Order," September 2, 2004.

III. Findings of Fact

1. The charging party is Bryan Has The Pipe, an enrolled member of the Assiniboine tribe. He was a resident of Park County, Montana, until he moved from the Livingston area in June 2004 while this case was pending. Has The Pipe was proud of his American Indian heritage, and purchased vanity license plates when he turned 18 and purchased his first car. The plates reflected his name, "HAZTHPIPE."

2. Respondent Park County, Montana, is a local government agency and political subdivision. The county is governed by a three-member board of county commissioners. During the period of August 2003 through September 2004, the commissioners were Ed Schilling, James Durgan and Ed Carrell.

3. At all times pertinent to this case, respondent Pete Adams is and has been employed as a deputy sheriff by the county.

4. Has The Pipe worked for Montana Clean, the janitorial service company that cleans the county courthouse building at 414 Callender Street in Livingston, Montana. Has The Pipe initially applied for his job through the state Job Service offices in Livingston. Montana Clean checked his references, hired him on or about August 21, 2003, and assigned him to work and clean in the courthouse building.

5. Montana Clean followed its usual practices for hiring employees working at the courthouse. As soon as the county could arrange it after Montana Clean hired Has The Pipe, he was fingerprinted and a check done by the county on his criminal history. The county did not advise Montana Clean that there was anything in Has The Pipe's background to indicate he should not be hired or that he should not work in the county building. The county's employees, including commissioners, law enforcement officers and the county attorney knew when Has The Pipe was working for Montana Clean that he was an American Indian, because of his last name.

6. All of Montana Clean's workers had to be bonded. Has The Pipe met all criteria and was qualified to work.

7. Montana Clean considered Has The Pipe to be a good worker. He arrived on time and did his work as instructed. Montana Clean used a team cleaning method, involving a 2-man working crew, one following closely behind the other, carrying all their equipment on their backs as they moved quickly through the areas to clean. The Montana Clean crew did more than one building nightly. At all times while he worked for Montana Clean, Has The Pipe was under the direct supervision of the crew team leader who was within a short distance ahead of him. The janitorial service handled a number of commercial buildings each week, including banks, medical offices and other facilities that contained a variety of critical and confidential information.

8. Adams issued a memo on August 27, 2003, about Has The Pipe cleaning in the sheriff's offices:

> It has been brought to my attention that Bryan Has The Pipe is now employed by the building cleaning service. Has The Pipe is not allowed in any office or room occupied by the Sheriff's Office.
>
> When the offices need cleaned [sic], a Deputy will present [sic] or they will not be cleaned. Please keep the office doors closed and secured, especially at night.

9. Adams acted as the senior deputy on duty when he wrote the memo. He did not consult with his superiors, who had no awareness of his memo when he issued it. Sheriff Carpenter was out of town at the time.

10. Adams' concerns related to Has The Pipe working in the sheriff's office; he did not address Has The Pipe cleaning in other locations within the City-County Building. Adams did not intend for Has The Pipe to lose his job.

11. The county distributed Adams' memo to all members of the sheriff's office and posted it in plain view where officers post notices of wanted criminals, suspects, locations where suspected criminal activities might be occurring, and other types of law enforcement information.

12. Sheriff Clark Carpenter's policy was to have an officer or other department employee present whenever an outsider was present in the secured areas of the sheriff's offices. No one was allowed to be in those areas without a member of the department present. The offices were not to be cleaned unless a deputy was present. Had the sheriff's office followed that policy, Montana Clean's crew could have worked in the sheriff's office only with a deputy present, and there would have been no possibility of a security concern giving rise to a decision to exclude Has The Pipe from the office.

13. When Adams issued the memo, the county and the sheriff's office were not following Carpenter's policy. Adams issued the memo without considering whether to follow the existing policy rather than excluding Has The Pipe from cleaning in the secured areas. Neither the sheriff nor the county, after learning about Adams' memo, ever considered following Carpenter's policy instead of ratifying and defending Adams' memo.

14. After Adams' memo was posted, the sheriff's office asked Park County Attorney Tara DePuy about Has The Pipe's presence on the cleaning crew for the City-County building. DePuy has been county attorney since 1995. DePuy expressed concerns about the situation to Park County Commission Chair Schilling. She told him that Has The Pipe had numerous contacts with law enforcement over an extended period of years and had failed to comply with the provisions of his sentences. She told him that Has The Pipe had a continuing pattern of violations which grew more serious over time and that he both associated with criminals and behaved disrespectfully in justice court. She supported barring Has The Pipe from the premises.

15. On September 2, 2003, the county sent a letter to Montana Clean regarding Has The Pipe, on Park County Commissioners' letterhead, signed by Commission Chair Schilling. The letter requested that Montana Clean not allow Has The Pipe to work in the City-County building, stating:

> It was brought to our attention that you have a Brian Has The Pipe in your employment, working in the City-County building. The Sheriff and the County Attorney do not feel this person should be working in this building.

> Effective immediately, we are requesting that you do not allow this person to work in this building.
>
> If you have any questions or comments do not hesitate to contact us at the address above.

16. Schilling signed the letter without agreement from the other two commissioners. Had Durgan been asked, he would not have signed the letter.

17. Schilling signed the letter in reliance upon the concerns expressed to him by DePuy and the sheriff's office. He did not independently investigate.

18. The county gave no notice to Has The Pipe of its directive to Montana Clean. Montana Clean gave Has The Pipe a copy of the September 2, 2003, letter.

19. The owners of Montana Clean, Kirk and Nicole McClain, asked to meet with the Commissioners about the September 2, 2003, letter. They wanted to know why Has The Pipe was being banned from the building (which was what they understood from the letter) and hoped to find a way for Has The Pipe to continue working for them at the county building.

20. The McClains met with two of the commissioners (Durgan and Carrell), representatives from the Sheriff's Office (Undersheriff Gary Tanascu and Captain Daniel Wertz) and DePuy on September 4, 2003. DePuy asserted that Has The Pipe had never been fingerprinted or his records checked. The McClains disputed that claim. The argument was cut short when DePuy left the meeting after a few minutes. The county did not provide any specific information to Montana Clean explaining why Has The Pipe was being banned from working in the building. Durgan and Carrell ratified Schilling's letter. The county neither gave public notice nor kept minutes of the meeting.

21. Carpenter testified as the county's designee regarding security policies and procedures of the county for access to the county's facility and offices as well as the professional standards of law enforcement officers. In that capacity, the sheriff described the security procedures for checking people who clean secure county offices. The county ran background checks and reviewed criminal history. If a felony conviction was reported, the person was excluded from cleaning secure offices, including the sheriff's offices.

22. Prior to Has The Pipe working as part of the Montana Clean cleaning crew at the courthouse building, the county had considered banning

Robert Cameron, a bonded and qualified employee of Montana Clean, from continuing to work in the City-County building based upon a past criminal record. The commissioners learned that Cameron, a white man who was working on the cleaning crew at the City-County building, had served time in Montana State Prison, apparently for a drug-related offense, and had a felony charge on his criminal record. The owners of the Montana Clean met with the commissioners, who, on advice from DePuy, told them that although Cameron did have a felony charge on his record and had spent time in prison for drug dealing, the felony charge had been dismissed after he was released from prison and the events involved charges from 30 years earlier. The county permitted Cameron to work in the building, based upon DePuy's advice that the county could not consider the felony charge which had been deferred and then dismissed after Cameron's release from incarceration.

23. The county had previously complained to Montana Clean about another of its employees who was then fired. Montana Clean had employed other American Indians, who cleaned at the City-County building without any complaints or adverse actions by Adams or the county.

24. Montana Clean offered to retain Has The Pipe as a full-time employee in a position which did not involve access to the City-County Building. The job was located in Yellowstone Park. Has The Pipe refused the offer because he did not wish to move. Montana Clean was unable to provide Has The Pipe with sufficient work within the Livingston area to keep him employed on a full-time basis.

25. On September 15, 2003, Has The Pipe filed his human rights complaint against the county.

26. During investigative proceedings and this contested case, the county presented a number of allegations to support its decision to exclude Has The Pipe from working in the City-County building. A pivotal source of many of the allegations was DePuy. She, at various times (in writing, in deposition and in testimony at hearing) asserted:

a. That her concerns related to Has The Pipe's contacts with law enforcement (ticketed once in 1997, four times in 1998, once in 2000, three times in 2001, and once in 2003) as well as unofficial reports of his disrespect for law enforcement officers;

b. That she relied on such information in advising the court as to criminal defendants and bond recommendations;

c. That she observed Has The Pipe in justice court and his demeanor showed he did not have respect for the procedure and the court (he slouched and shrugged) and "this attitude" was part of the basis for her conclusion he was disrespectful toward law enforcement, the law, and the judicial system, and should not work unsupervised in her office in the City-County Building;

d. That when Has The Pipe "appears in court he is disrespectful" of the "whole process, rude and has that attitude that he does not like whole judicial system," suggesting that she had seen him in court on several occasions;

e. That she had been in her office in the City-County Building when cleaning was taking place, observing the second member of the cleaning "team" arrive 5 to 10 minutes after the first member of the team completed his/her tasks, and had told the commissioners that individuals who clean in the basement of the City-County building were not supervised, out of her concern for her own confidential records;

f. That she made an inquiry as to who had keys to the offices for cleaning purposes, because during a trial in 1998, she worked late in the evening and had concerns about the cleaning situation (*i.e.*, about the possibility of being assaulted by someone in the building after hours, and about unauthorized access to her records);

g. That Has The Pipe had "numerous misdemeanors and negative contacts with law enforcement," was a "player" in different things [criminal activities] in the community,[2] was in a "grey area" and "was on the edge of other [illegal or questionable] things."

27. In addition, DePuy (responding to a question in her deposition) named three white persons about whom she would have concerns regarding access to the City-County building–one for allegedly having threatened to kill her; one who had a felony conviction and made threatening statements toward her and toward social workers and sheriff's personnel including a threat to blow up the City-County building; one who had a felony homicide conviction, threatened DePuy and law enforcement officers and killed a witness in a pending case and one who had numerous felony convictions, including a felony

[2] ***See*** Finding 34, ***infra***, for Sheriff Carpenter's view of the term "player."

homicide conviction, and had threatened to kill one of the county's detention officers. She subsequently prepared (at the request of Has The Pipe's counsel) a list of 36 additional white persons about whom she would have concerns regarding access to the City-County building. Those individuals had been charged with felony assault, misdemeanor assault, assault with bodily fluids, assault on a police officer, attempted assault on a police officer, resisting arrest, obstructing a police officer, reckless eluding of a police officer, fleeing/eluding a police officer, escape, attempted escape, obstructing justice and impersonating a police officer.

28. In early September 2003, when DePuy supported Schillings' letter banning Has The Pipe from working on Montana Clean's cleaning crew in the City-County building, Has The Pipe's record consisted of tickets for speeding, minor in possession of tobacco, minor in possession of alcohol and no vehicle insurance (both dismissed on proof of insurance). He had not then and has not now ever been convicted of any felony. He had not then been arrested, placed in custody or incarcerated. Has The Pipe's record differed dramatically from those of the white persons as to whom DePuy had concerns regarding access to the City-County building.

29. DePuy had not frequently observed Has The Pipe in justice court. She had never spoken to him in court and had seen him once in Justice Court with his mother. DuPuy's stated concerns about Has The Pipe's attitude and conduct were not reasonably based on actual observations of him, but on unsubstantiated second-hand information that amounted to nothing more than rumor and gossip.

30. Other than DePuy, employees and designated representatives of the county gave statements, written statements, depositions and testimony at hearing explaining their individual views and their understanding of the county's view of why Has The Pipe's work as a member of Montana Clean's crew in the City-County building was a matter of legitimate concern:

> a. Carpenter agreed with the decision to ban Has The Pipe because (1) "Obviously he's had some negative experience with law enforcement that I don't feel he would be a good security risk," (2) the county had long considered Has The Pipe a "trouble maker," (3) including causing "trouble" while a student in the Shields Valley schools, and (4) Has The Pipe had negative "interactions with different police officers."
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> b. Schilling understood that banning Has The Pipe was based on feelings and possibly "guilt by association" (he knew

nothing about associates of Has The Pipe which supported the decision), but was "very comfortable" with banning Has The Pipe from working in the county building because he concluded from his discussions with DePuy and Carpenter that Has The Pipe was a "bad guy/bad kid," likely to engage in acts of "revenge" or "tearing stuff up" if allowed to work in the building.

c. Tanascu claimed he "was aware of several negative contacts" that Has The Pipe "had with Park County Law Enforcement Officers."

d. Wertz wrote that Has The Pipe "has bad problems and respect with law enforcement."

e. Carpenter believed Wertz may have reported that Has The Pipe was a "troublemaker" because his parents threatened to sue the Shields Valley school district for denying their son equal opportunities.

f. Brent Rudolph, identifying himself as a deputy probation officer, gave a written statement alleging that there was a "long and negative relationship with local law enforcement," that Has The Pipe was "more than occasionally named in reports" in his office, that Has The Pipe had engaged in "questionable activity," and that Has The Pipe had "ethical deficiencies."

g. Adams claimed Has The Pipe was a "known drug user."

31. Carpenter supported the decision to ban Has The Pipe in reliance upon unsubstantiated second-hand information from other law enforcement officers. Schilling did the same. As a whole, the law enforcement officers who allegedly reported the negative information about Has The Pipe had limited or no first hand knowledge about the purported problems with Has The Pipe.

32. The county claimed that Has The Pipe was banned from working in the county courthouse because "he has a history of very negative interactions with law enforcement in the County," that "there is confidential law enforcement information located in the building which would be easily accessible to an individual with access to the office," and that he represented a "security risk." The county offered statements from the undersheriff (Tanascu), the county attorney (DePuy), a deputy probation officer (Rudolph), a health services nurse (Suzanne Brown), a deputy sheriff (Adams) and a sheriff's captain (Wertz) to support those claims. None of the statements

contained any specifics. Several of the statements consisted entirely of unsubstantiated derogatory remarks about Has The Pipe.

33. Tanascu indicated in his written statement that he did not know Has the Pipe and had never had to answer any calls concerning him. Tanascu told the Human Rights Bureau investigator that he did not know Has The Pipe. Tanascu testified that he gave Has The Pipe a "minor in possession" ticket for tobacco when Has The Pipe was 16 years old. Tanascu recalled nothing about the incident. Tanascu had no substantiated first-hand knowledge of any negative contacts between Has The Pipe and county law enforcement officers.

34. According to Carpenter, professional law enforcement officers do not use the term "player" in referring to a person suspected of being involved in criminal activity. That term is more likely a product of television writers.

35. Suzanne Brown is the county health nurse. She had no knowledge of Has The Pipe and did not even know his name. Brown had locked file cabinets for confidential documents in her office. Brown did not testify.

36. Wertz told the human rights investigator that he had not had any negative contacts with charging party. Wertz did not testify.

37. Has the Pipe did not know and had not had any contact with Brent Rudolph. Rudolph did not testify.

38. Adams did not testify at hearing.[3] He did not directly deny or dispute the allegations in the complaint.

39. Has The Pipe apparently has a very bad general reputation with local and county law enforcement when they are talking among themselves. At the time the county decided to ban him from working in the City-County building, that bad general reputation was not supported by any specific facts. The county decided to ratify and amplify Adams' action, knowing that Has The Pipe had never been convicted of any felonies, knowing that traffic violations were not a reliable indicator of any security risk and knowing or reasonably being able to verify from Has The Pipe's records that he did not constitute an objective security risk.

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[3] As noted in Section I, "Procedure and Preliminary Matters, excerpts of his deposition testimony are in the record.

40. The "troublemaker" label related to Shields Valley resulted from legal actions brought by Has The Pipe's adoptive parents regarding issues of discrimination, including whether he was being treated differently and less favorably than other students because he was Native American and whether his learning disabilities were being accommodated or ignored (in part or in whole because of his race). The first complaint about discriminatory treatment was made when Has The Pipe was a third grader of 8 or 9 years of age, and persisted through his high school years, culminating with an action in federal court. The county produced no evidence that Has The Pipe had any negative interactions with law enforcement officers while he was in school.

41. The county banned Has The Pipe from working in the City-County building. The county had never banned any white persons from working in any county buildings. The county had never denied any white persons the opportunity to work in the City-County building because the county saw them as security risks, or because the county saw them as trouble makers, or because the county saw them as having a disrespect for law enforcement.

42. The county had no reasonable basis for banning Has The Pipe from working in the City-County building.

43. In excluding Has The Pipe from working in the City-County building, the county applied a different and less favorable standard than that it applied to white persons it characterized as warranting similar action. Has The Pipe had not engaged in, been accused of or been charged with any of the types of charges leveled against the white persons the county identified as being sufficiently disrespectful of law enforcement to exclude from working in the building. Nevertheless, the county excluded Has The Pipe.

44. The county's ban against Has The Pipe working in the City-County building made it impossible for Has The Pipe to maintain full-time employment with Montana Clean within the Livingston area. He did get other employment before the end of September at R-Y Timber in Livingston at a higher wage.

45. On December 7, 2003, Has The Pipe and Rod Kurtz were riding in Danny Baldwin's pick-up truck. In the early morning hours, Has The Pipe engaged in a series of cell phone calls with Jennifer John and Sara Stokke, who were staying at the home of Jennifer's grandfather, Francis John, on Brackett Creek Road in Park County. The young women invited the young men to visit and Baldwin drove to the John residence at around 3:35 a.m. that morning.

46. When the three young men arrived, Jennifer John took Baldwin into Francis John's home to visit with Stokke. Has The Pipe and Kurtz entered the home of Alana John, another granddaughter of Francis John, next door to Francis John's home.[4] Alana John was not home, but arrived home while Has The Pipe and Kurtz were in her residence. She took them outside, where they met Baldwin. Baldwin was fleeing from Francis John who was armed and pursuing him. The three young men fled the area in Baldwin's truck. The incident lasted perhaps half an hour.

47. Francis John notified the sheriff's office. He complained that Baldwin had been in his home without permission, and that Kurtz and Has The Pipe had been in Alana John's home without permission and had done damage to her home and stolen some of her property.

48. In the subsequent criminal investigation by Deputy Totland, Alana John initially reported that 50 of her compact disks, worth approximately $15.00 each, were missing and that substantial damage had been done to her front door, forcing it open, and to some furnishings within her home. She subsequently reported a missing ring which she falsely reported was worth $3,900.00. Jennifer John, Stokke and Shandra Chambers, another young woman staying at Francis John's home that night, gave statements that conflicted in some particulars and had some internal inconsistencies. Totland initially planned to recommend charges against all three young men, but also considered whether the three young women might have been "partying and breaking up" Alana John's home before the young men arrived, and decided to pursue further statements from the young women.

49. A few days later, Alana John reported to Totland that Has The Pipe had repeatedly called her in efforts to get her to drop the charges against him, and that she felt threatened by his calls. Has The Pipe made the calls because he could not believe that Alana, who he had known in high school, would accuse him of stealing from her or breaking into her house and he wanted to convince her that he had not. Totland then recommended and DePuy decided to bring charges of felony burglary, felony theft and felony criminal mischief against Has The Pipe and Kurtz, with an additional charge of felony witness tampering against Has The Pipe. DePuy told Totland that Baldwin would not be charged with criminal trespass because he, by all accounts, had been invited into the Francis John residence. The other charges related to the Alana John residence, which Baldwin had not entered.

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[4] One of the many contradictions in the various witness statements was Jennifer John's statement that all three young men were in Alana John's residence when she met them.

50. Has The Pipe was arrested on a warrant and hired an attorney with money loaned to him by his parents. In May 2004, the felony charges were dropped in a plea agreement. Has The Pipe made an Alford or "no contest" plea to two misdemeanor charges. He was placed on six months probation and required to pay fines, costs and restitution. He agreed to the plea despite claiming his innocence. He never admitted any guilt. He did not trust any county officials or law enforcement officers in prosecuting the charges. The risk he saw of being wrongly convicted and imprisoned for crimes he denied made him agree to the plea.

51. The adverse actions (seeking charges, bringing charges, the arrest and the plea agreement) taken by the county against Has The Pipe in connection with this incident were not unreasonable and were not retaliatory.

52. Both before and after filing his human rights complaint, Has The Pipe had numerous interactions with law enforcement officers employed by the Montana Highway Patrol, the Park County Sheriff's Office and the Livingston Police Department. The majority of those interactions were routine. In a few unusual interactions, there were harsh and sometimes loud words exchanged. Prior to making his assertions of retaliation while his human rights complaint was pending, Has The Pipe had not initiated complaints to law enforcement or other government entities regarding these interactions. His parents had initiated one complaint to the Livingston Police Department, in which Has The Pipe participated, about one interaction with Livingston police officer John Mathias, however.

53. Some law enforcement officers either exercised greater caution or were distant or hostile in demeanor when interacting with Has The Pipe. In some interactions, Has The Pipe himself instigated the distance or hostility by his own demeanor, actions and words. In all instances, the involved officers did not take adverse action against Has The Pipe during the interactions.

54. Has The Pipe concluded that he was not safe in Park County. He believed that law enforcement had "framed" him and treated him differently with regard to the John incident because he was an American Indian, and that they might go even further and harm him after stopping him again without probable cause. Has The Pipe decided that he had to move out of Park County. He removed his personal license plates that he had acquired with his first car at age 18, out of fear of being targeted by law enforcement. He and his family believed that he might be stopped for false or fabricated reasons, that false or fabricated charges might be brought against him and that deadly force might be used against him by a hostile or overreacting law enforcement officer. He and his family discussed what to do if law enforcement officers

stopped him when he was alone, precautions to avoid that and emergency measures they could take for self-protection.

55. Has The Pipe did fear for his safety when he moved from Park County, but without an objectively reasonable basis. Law enforcement had not harassed or stalked him after he filed his original discrimination complaint either by reason of his race or by reason of the filing of that complaint.

56. Has The Pipe, in September 2003, lost approximately $680.00 (80 hours of work at $8.50 per hour) by reason of the county's action in barring him from working in the City-County building. That loss accrued at the end of September 2003. Pre-judgment interest upon that loss through the date of this decision is $88.68 (.1 per annum times $680.00 divided by 365 days per annum times 476 days).

57. Has The Pipe suffered emotional distress as the direct result of the county's action in barring him from working in the City-County building. Has The Pipe correctly perceived the county's motive as discriminatory. He experienced anger, fear and loss of self-esteem as a direct result of the county's discriminatory adverse action in forcing him out of his job because he was an American Indian. He is entitled to recover $15,000.00 by reason of that emotional distress.

IV. Opinion[5]

Montana law prohibits discrimination by an employer in the terms of employment because of race. Mont. Code Ann. § 49-2-303(1)(a). Included within the unlawful discriminatory practices this statute prohibits is barring a person from employment because of race. ***Id.***

Mont. Code Ann. § 49-2-303(1)(a) states that it is an unlawful discriminatory practice for "an employer . . . to bar a person from employment." In addition, Mont. Code Ann. § 49-2-101(11) defines "employer" as "an employer of one or more persons or an agent of the employer." Monana Clean rather than the county employed Has The Pipe. However, the county is certainly an employer and Adams certainly is an agent of the county, even though the county did not employ Has The Pipe.

[5] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

1. Race Discrimination in Barring Has The Pipe from Working in the City-County Building

There is no substantial and credible direct evidence from which the hearing examiner can find that any individual acting on behalf of Park County, from Commission Chair Schilling and Sheriff Carpenter to Deputy Adams, made a conscious decision to take adverse action against Has The Pipe because he was American Indian or subsequently because he had filed a human rights complaint against the respondents.

Has The Pipe offered evidence that Deputy Totland said remarkably vehement negative things about him. Has The Pipe also offered evidence that Totland was the "only officer who said negative things about Has the Pipe," but that evidence (deposition testimony from Adams) was not credible. Has The Pipe's argument (that Totland's demonstrable racial bias contaminated the entire sheriff's department) was not supported by substantial and credible evidence. Overall, Has The Pipe failed to prove by direct evidence that the respondents were motivated by conscious racial bias against him because he is American Indian.

In the absence of direct evidence, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792 applies. The shifting burdens of proof set forth in *McDonnell Douglas* were designed to assure that plaintiffs have their day in court "despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston* (1985), 469 U.S. 111, 121, ***quoted in*** *Laudert v. Richland County Sheriff's Office*, ¶ 22, 218 MT 2000, 301 Mont. 114, 7 P.3d 386; ***see also*** *Martinez v. Yellowstone County Welfare Department* (1981), 192 Mont. 42, 626 P.2d 242, 245-46 (observing that one of the purposes of the *McDonnell Douglas* test is to ease the difficulty of bringing a claim of employment discrimination in the absence of direct evidence).

The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e ***et seq***. Where there is no direct evidence of discrimination, Montana courts have applied the three-tier standard of proof articulated in *McDonnell Douglas*. *Hearing Aid Institute v. Rasmussen* (1993), 258 Mont. 367, 852 P.2d 628, 632; *Crockett v. City of Billings* (1988), 234 Mont. 87, 761 P.2d 813, 816; *Johnson v. Bozeman School District* (1987), 226 Mont. 134, 734 P.2d 209, 212-13; *European Health Spa v. H.R.C.* (1984), 212 Mont. 319, 687 P.2d 1029, 1032; *Martinez,* ***supra***, 626 P.2d ***at*** 246.

The *McDonnell Douglas* "burden-shifting approach" applies because this case involves circumstantial evidence rather than direct evidence of unlawful discrimination (also know as a "pretext" case). ***See***, *Laudert*, ***supra at*** ¶20.

The *McDonnell Douglas* standard has three parts:

> (1) Has The Pipe must establish a prima facie case of discrimination;
>
> (2) if he makes such a showing, the burden shifts to respondents to produce a legitimate, nondiscriminatory reason for its actions; and
>
> (3) if they make such a showing, Has The Pipe may show, by a preponderance of the evidence, that the legitimate reasons they offered are only a pretext for discrimination.

Vortex Fishing Systems, Inc. v. Foss, ¶ 15, 2001 MT 312, 308 Mont. 8, 38 P.3d 836.

The elements of a prima facie case depend on the facts of the case. *Vortex Fishing Systems* ***at*** ¶ 16. Has The Pipe must show that (1) he is a member of a protected class; (2) he was qualified for his employment; and (3) he was subjected to adverse action in circumstances which gave rise to a reasonable inference that he was treated differently because of his membership in the protected class. *Id.* ***and*** Admin. R. Mont. 24.9.610(2)(a).[6]

Has The Pipe proved his prima facie case. He is American Indian and he was qualified to hold his job with Montana Clean. In addition, the county ratified and extended Adams' initial decision, barring Has The Pipe from working in the City-County building, even though he did not have the kind of criminal history typical of all of the other people (white people) DePuy subsequently identified as examples of persons the county would not trust working in the City-County building.

Has The Pipe's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the respondent county to "articulate some legitimate, nondiscriminatory reason for the [adverse action]." *McDonnell Douglas* ***at*** 802. This burden required that the county present competent evidence that it had a legitimate nondiscriminatory reason for barring Has The Pipe from working in the City-County building. *Crockett* ***supra***, 761 P.2d at 817. The county had to satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

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[6] ***Cf. also***, *Martinez* ***supra***, 626 P.2d ***at*** 246 ***citing*** *Crawford v. West. Electric Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the four elements of the first tier of *McDonnell Douglas* to the allegations and proof of the particular case).

> [It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Dept. of Comm. Affairs v. Burdine (1981), 450 U.S. 248, 255-56.

The county did articulate a legitimate non-discriminatory reason (security) for its adverse action. Once it produced this legitimate reason, Has The Pipe had the burden to prove that the county's reasons were in fact a pretext. *McDonnell Douglas* ***at*** 802; *Martinez*, 626 P.2d ***at*** 246. To meet this third tier burden, Has The Pipe could present either direct or indirect proof of the pretextual nature of the company's proffered reasons:

> [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine ***at*** 256. Ultimately, Has The Pipe had the burden to persuade the fact-finder that the company did illegally discriminate against him. *Crockett*, ***op. cit.***, 761 P.2d at 818; *Johnson*, ***op. cit.***, 734 P.2d at 213. He met this burden.

This is a case of adverse treatment directed toward Has The Pipe based on the "gut reactions" (feelings and suspicions) of various employees and agents of Park County. Has The Pipe is a large young man, heavy set and, by observation during the hearing, either unusually quiet and immobile or visibly agitated in a stressful situation. According to the credible evidence of record, he sometimes became loud when angry. He is not stereotypically American Indian in appearance, even though some of his friends apparently called him "the big Indian." Nevertheless, employees and agents of the county knowing Has The Pipe was American Indian, perceived him as "different" and apparently considered that difference *per se* potentially threatening or dangerous. Despite having no valid factual basis, the county's employees and agents, beginning with Adams, labeled Has The Pipe as a bad, potentially violent and untrustworthy person, assigned him a reputation far dirtier than his minimal criminal record and barred him from working in the City-County building.

The county offered no credible explanation for this adverse treatment of Has The Pipe in the name of security. To rely upon gossip and rumor was not reasonable. To justify that reliance upon gossip and rumor with thoroughly

subjective opinions that Has The Pipe looked like he was disrespectful or acted disrespectfully was not credible.

The whole point of *McDonnell Douglas* is to relieve the charging party of the potentially impossible burden of presenting a snapshot of the subjective motivation of the respondent. One of the reasons for not insisting upon direct evidence of motive is that unwitting or ingrained bias is as culpable and as unacceptable as conscious or intentional biased conduct:

> It is well-settled that a plaintiff need not prove "intentional" discrimination. In *Thomas v. Eastman Kodak Company*, 183 F.3d 38 (1st Cir. 1999), the Court of Appeals for the First Circuit endorsed the position of the Court of Appeals for the District of Columbia Circuit, articulated in *Hopkins v. Price Waterhouse,* 825 F.2d 458, 469 (D.C.Cir. 1987) and affirmed in relevant part by the Supreme Court. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-52, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion). In *Thomas,* the Court of Appeals for the First Circuit stated:
>
> > [T]he disparate treatment doctrine focuses on causality rather than conscious motivations, since *unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated* discrimination . . . .
>
> *Thomas,* 183 F.3d at 60.

Dow v. Donovan (D.C. Mass. 2001), 150 F. Supp. 2d 249, 263-64.[7] [The hearing examiner added the emphasis in the internal quotation from *Thomas*.]

In this case, county officials who heard about the reputation Has The Pipe had with law enforcement could understandably have asked if his access to the offices in the City-County building after business hours constituted a security risk. However, before approving and supporting a decision to bar Has The Pipe from working in the City-County building, which interfered with his established means of earning a living, they had a duty to verify the basis of that

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[7] In Lexis-Nexis©, the first sentence, "It is well-settled that a plaintiff need to [sic] prove 'intentional' discrimination." The context makes it plain that this is a typographical error. The published opinion, in 150 F. Supp. 2d, correctly reads, "It is well-settled that a plaintiff need not prove 'intentional' discrimination." The Montana State Law Library is contacting Lexis-Nexis© to point out the error.

reputation, rather than relying upon it without regard to whether it had any valid basis in fact. "He looked dangerous" and "He looked disrespectful" are equally insufficient justifications for adverse treatment that did imperil his employment, without adequate documentation or investigation.

With war raging in the Middle East and regular media reports of "alerts" regarding potential terrorist attacks, these are perilous times for civil liberties, because suspicion of those who appear "different" readily escalates into fear and hostility. The county obviously has a legitimate and reasonable interest in maintaining the security of the public offices, particularly law enforcement offices, in its premises. However, the settled law of Montana prohibits barring a person from employment because of his race. The county offered much speculation and opinion, but no facts available to it in September 2003, to justify treating Has The Pipe as such a security risk that he could not work in the City-County building any longer. The county failed to establish that his criminal record was at all comparable to those of the white persons to whom a similar "concern" might apply. The county failed to present any evidence that in September 2003 Has The Pipe was a legitimate target for any on-going criminal investigation. The county offered no valid basis for singling out Has The Pipe as a focus of its security concerns.

An employer cannot use after-acquired evidence to support employment action. *Jarvenpaa v. Glacier Electric Cooperative, Inc.* (1998), 292 Mont. 118, 970 P.2d 84, 90; *Galbreath v. Golden Sunlight Mines, Inc.* (1995), 270 Mont. 19, 890 P.2d 382, 385; *Flanigan v. Prudential Fed. S&L* (1986), 221 Mont. 419, 720 P.2d 257, 264; *Swanson v. St. John's Lutheran Hosp.* (1979), 182 Mont. 414, 597 P.2d 702, 706; ***see*** *Chapman v. A.I. Trans.* (11th Cir. 2000), 229 F.3d 1012, 1068, Fntn 101; *McKennon v. Nashville Banner* (1995), 513 U.S. 352, 359-60. An employer can use after-acquired evidence to support reasons for termination given in a termination letter or to rebut evidence presented by the charging party. *Jarvenpaa*, ***op. cit. at*** 970 P.2d at 128; ***see also*** *McKennon,* ***op. cit. at*** 361-62. However, subsequent felony charges are not "after-acquired evidence" about events that had occurred (albeit without the county's knowledge) at the time the county took its adverse action against Has The Pipe. There simply was not a sufficient basis in fact in September 2003 to exclude Has The Pipe from working in the City-County building.

The county could not point to written policies or guidelines regarding security risks, in existence in September 2003, upon which it relied in deciding to preclude Has The Pipe from working in the City-County building. Indeed, in September 2003, the county was not following Sheriff Carpenter's existing security policies regarding cleaning secure areas. The evidence at hearing

suggests that those policies are still in place and are still being ignored and that the county still has not articulated a consistent policy for excluding persons from working in the City-County building. The county presented no valid existing justification for its adverse action, and its pretextual justifications further supported the inference that its actual motive was discriminatory. ***See***, *Hernandez v. Hughes Missile Systems Co.* (9th Cir, 2004), 362 F.3d 564, 568-69.

Ultimately, Has The Pipe met his burden of establishing that the county's legitimate, non-discriminatory reason (security) for its adverse action was a pretext. Has The Pipe's evidence persuaded the hearing examiner that had he been a white man named Brian Smith, whose appearance and behavior were stereotypically white and whose parents had not quarreled with the Shields Valley school district about possible racial bias in his education, the county would not have barred him from working in the City-County building. The county precluded Has The Pipe from working in the City-County building because his race unjustifiably aroused the fears and suspicions of county employees and agents.

2. Race Discrimination or Retaliation in Subsequent County Actions Directed at Has The Pipe

In addition to prohibiting race discrimination in employment (see above), Montana law also bans retaliation against a person who files a discrimination complaint under the Human Rights Act or participates in a proceeding under the Act. Mont. Code Ann. § 49-2-301; *Mahan v. Farmers Union Central Exchange, Inc.* (1989), 235 Mont. 410, 768 P.2d 850, 857-58. Has The Pipe claimed that after he filed his discrimination complaint the county retaliated[8] by conducting a biased investigation and overcharging him regarding his acts during an incident in December 2003, thereafter treating him (through harassment and stalking by law enforcement) so adversely that he had to move away from his community, his job, his family and his friends because he feared for his safety.

To establish his prima facie case of unlawful retaliation in violation of Mont. Code Ann. § 49-2-301, Has The Pipe must prove three elements: (1) that he engaged in activities protected by the Human Rights Act; (2) that

[8] To the extent that Has The Pipe also pleaded and perfected claims for race discrimination in alleged subsequent county adverse actions, the same analysis applies and the same results obtain as for the retaliation claims. Such race discrimination claims would arise as discrimination by the state (under Mont. Code Ann. § 49-2-308) rather than employment discrimination, but given the decision regarding the retaliation claims, the procedural propriety of any such race discrimination claims is moot.

the county subjected him to significant adverse acts and (3) that there was a causal connection between these adverse acts and his protected activities under the Act. Admin. R. Mont. 24.9.603(1).[9]

Has The Pipe clearly established the first element of his prima facie case. He engaged in activities protected by the Act in filing and prosecuting his complaint of racial discrimination, under the plain language of Mont. Code Ann. § 49-2-301, which includes filing a discrimination complaint under the Human Rights Act or participating in a proceeding under the Act.

Has The Pipe clearly established the third element of his prima facie case. Admin. R. Mont. 24.9.603(3) dictates a disputable presumption of retaliatory motive for significant adverse acts against a Human Rights Act complainant while the complaint is pending or within six months after its resolution. All of the conduct at issue in this case occurred while Has The Pipe's complaint against the county was pending.[10] The required presumption of retaliatory motive, establishes a causal connection between Has The Pipe's protected activity and the alleged adverse acts. *Laib v. Long Construction Co.* (Aug. 1984), HRC Case No. AE80-1252, ***quoting*** *Cohen v. Fred Meyer, Inc.* (9th Cir. 1982), 686 F.2d 793; ***see also***, *Schmasow v. Headstart* (June 1992), HRC Case No. 8801003948; *Foster v. Albertson's* (1992), 254 Mont. 117, 127, 835 P.2d 720, ***citing*** *Holien v. Sears Roebuck* (Or. 1984), 689 P.2d 1292.

Unlawful and retaliatory actions include "coercion, intimidation, harassment . . . or other interference with the person or property of an individual." Admin. R. Mont. 24.9.603(2)(a). Charging Has The Pipe with multiple felonies in December 2003 was manifestly an adverse act that would and did interfere with his person and his property. Has The Pipe established the second element of his prima facie case with regard to that event.

The county's defenses to allegations of unfairly harsh treatment in the felony charges were twofold. First, the county asserted an absolute defense arising out of the Alford or "no contest" (*nolo contendere*) plea that Has The Pipe entered, as part of a plea bargain reducing the felony charges to misdemeanors. Second, the county argued that the charges were appropriate and not unfairly harsh.

The county's first defense fails as a matter of law. Has The Pipe's no contest plea to the misdemeanor charges carries no collateral estoppel effect in

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[9] Sub-chapter 6 of the Commission's rules applies to this contested case before the department, including section Admin. R. Mont 24.9.603. Admin. R. Mont 24.9.107(1)(b).

[10] Evidence of the HRB investigation proved the county's knowledge of the complaint.

this administrative civil proceeding. Whether the county had sufficient evidence to charge Has The Pipe with the multiple felonies was not finally adjudicated in the criminal proceedings, and Has The Pipe is not collaterally estopped to make this retaliation claim. ***Cf.***, *Safeco Insur. Co. v. Liss*, ¶¶ 46-51, 2000 MT 380, 303 Mont. 519, 16 P.3d 399 (insurer not entitled to summary judgment in a subsequent civil proceeding that its insured acted illegally or intentionally, based upon the insured's no contest guilty plea to aggravated assault–the plea carries no collateral estoppel effect in the civil proceedings, because whether the insured acted intentionally or committed an illegal act was not finally determined in the criminal case, as a matter of law).

On the other hand, Has The Pipe's plea does constitute an admission that there was enough evidence to make it likely that he would be convicted. That plea is consistent with his testimony at this hearing that he feared the State would convict him of the felony charges and thus entered into the plea agreement. These admissions constituted a concession, made in both the prior criminal proceeding and in this proceeding, that Has The Pipe believed the county had enough evidence to convict him. That concession is admissible as evidence in support of the reasonableness of the county's decision to charge the felonies. ***Cf.***, Mont. R. Ev. 801(2)(A). It is not conclusive evidence on the question, but it certainly supports a finding that the charges were reasonable.

Has The Pipe also attacked the sufficiency of the investigation because of Totland's role as the investigator, given his profoundly negative views of Has The Pipe. There is no evidence that DePuy was aware, at the time she decided what charges to bring against Has The Pipe, of the animosity Totland had toward Has The Pipe.

Even if DePuy had been aware of Totland's feelings, the ultimate basis for deciding whether she should reasonably have required further investigation before charging Has The Pipe is whether the investigatory materials provided to her were deficient on their face. The materials were not deficient on their face.[11] Totland could have spent more time interviewing Has The Pipe. He could have pursued the inconsistencies in other witness statements. He could even have obtained the cell phone records offered at trial. But even had he done this additional work, there was still be a basis for the felony charges.

When the facts in a criminal matter support possible charges of more than one crime, the actual charge made is a matter for prosecutorial discretion. *State v. Schmalz*, ¶ 9, 1998 MT 210, 290 Mont. 420, 964 P.2d 763; ***citing*** *State*

[11] For this reason, there are no findings regarding Totland's hostility toward Has The Pipe, which was real but ultimately not relevant.

v. Booke (1978), 178 Mont. 225, 230, 583 P.2d 405. This general principle does not mean that a prosecutor can charge one defendant more harshly than another based upon race, but the facts in this case do not support such a conclusion. The differential treatment of Baldwin was justified by the difference in his conduct, as reported in the various statements. Has The Pipe and Kurtz were in Alana John's residence that night, Baldwin apparently was not. Baldwin had an invitation to enter Francis John's residence, from one or two of the young women who resided there. Baldwin's race was not the pertinent difference between his situation and that of Has The Pipe.

Has The Pipe called an expert witness, Mark Hartwig, to testify that the investigation was flawed and incomplete and therefore the county overcharged Has The Pipe. Rule 702, Mont. R. Ev., provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

An expert may not properly testify about either ultimate determinations on legal issues for the fact-finder or circumstances where no specialized knowledge is necessary to make the ultimate determination from the evidence, because the expert then becomes an advocate for an outcome rather than a necessary aid for the fact-finder's understanding. *Kizer v. Semitool, Inc.* (1991), 251 Mont. 199, 205-07, 824 P.2d 229; *Heltborg v. Modern Machinery* (1990), 244 Mont. 24, 31-32, 795 P.2d 954; *Mahan, **op. cit.**,* 235 Mont. ***at*** 421; 768 P.2d 850; see also, *Crockett v. City of Billings* (1988), 234 Mont. 87; 761 P.2d 813; *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 748 P.2d 937, ***quoting*** *Marx Co. v. Diners' Club* (2nd Cir. 1977), 550 F.2d 505, ***cert. den.*** 434 U.S. 861.

Has The Pipe's expert testimony in this case was nearly pure advocacy. Just as an expert in a wrongful discharge case could not properly testify to his legal conclusion that the employer had violated the covenant of good faith and fair dealing, *Heltborg*, ***supra***, Hartwig's conclusory opinion testimony that the investigation did not support the felony charges went beyond the scope of proper expert testimony. That testimony was, in substance, a statement of his opinion about the law of the forum, which the hearing examiner would err in relying upon, *Hart-Anderson*, ***supra***.

Even considering Hartwig's opinions, which differed from the opinions of DePuy, the evidence as a whole of "overcharging" was unpersuasive.

Substantively, the testimony of the prosecution's potential witnesses, if believed, established the elements of the felony charges. If those witnesses were disbelieved, Has The Pipe might well have obtained dismissal of the charges.[12] There is ample reason, in the investigative reports, to question the credibility of the witnesses. However, there is also ample reason, aside from his fear of racial bias among the jurors, for Has The Pipe to conclude that the adverse witnesses might be believed despite the inconsistencies in their statements. Either Has The Pipe and Kurtz were involved in the alleged criminal acts, or some of the witnesses (***i.e.***, some of the young women staying in Francis John's residence that night) did the damage, removed or concealed the reportedly missing property, then blamed the young men.[13] There are problems with both scenarios. The decision of DePuy to charge Has The Pipe and then offer the plea bargain and the decision of Has The Pipe to take the plea agreement both seem reasonable in light of the potential uncertainty surrounding the actual events.

Under these circumstances, the hearing examiner cannot find that the county overcharged Has The Pipe. The legitimate business reason–proper exercise of prosecutorial discretion given the investigative information available–was not pretextual.

With regard to the allegations that law enforcement stalked and differentially treated Has The Pipe after he filed his original human rights complaint, the evidence is insufficient to support such a finding. Has The Pipe presented evidence that he feared calling city and county law enforcement and county and did not trust them after the John incident, but that evidence was not credible. In May 2004, Has The Pipe called dispatch to report a broken window at his residence. The police responded to his home. There was no problem between Has The Pipe and officers during this incident. Has The Pipe also recalled an incident with law enforcement which occurred when he was with a friend at Rumors, a bar in Livingston. Officers (Has The Pipe

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[12] For one example, had the case against Has The Pipe gone to trial, there might have been a finding that Has The Pipe and Kurtz were invited into Alana John's residence by Jennifer John, with the door already broken open, or conversely there might have been a finding that the two young men broke open the door and entered the residence after Jennifer John took Baldwin to Francis John's residence. The hearing examiner deliberately omitted any findings on such facts, which were never adjudicated in the criminal proceedings. The sole issue in this hearing regarding such facts is whether DePuy, as an agent of the county, abused her prosecutorial discretion in charging Has The Pipe based upon the investigative materials. There was substantial room for the good faith exercise of prosecutorial discretion.

[13] Has The Pipe may have been suggesting a third scenario–that Totland intimidated or otherwise coerced some of the witnesses to make charges against the young men. The substantial evidence of record simply does not support such a scenario.

remembered Deputy Blake Blatter) came in and said there had been a complaint regarding trouble across the street. The friend was acting inappropriately; he was rowdy, drunk and belligerent. Has The Pipe was trying to get him to finish his drinks and go home. There was no problem between Has The Pipe and officers during this incident. In a prior incident, a law enforcement officer told Has The Pipe that there was a warrant issuing against him for failure to pay a fine. He and his mother went and paid the fine and the warrant was never served.

Sheriff Carpenter does not have patrol officers routinely engage in surveillance. He knew of no Park County Sheriff's Office surveillance of the home, vehicle, or person of Has The Pipe. Has The Pipe was unable to present testimony from others who drove or rode in his car, corroborating his accounts of that car being followed or stopped. The only corroborated incident after September 2003 involved a City of Livingston police officer, and there was no evidence that the officer even knew Has The Pipe.

Given the illegal discrimination the county visited upon Has The Pipe in his employment, the possibility exists that some of the county's law enforcement employees subsequently retaliated against Has The Pipe because he pursued his complaint. However the commission of a prior bad act is not admissible as proof that it is more likely that the individual committed a subsequent bad act consistent with their "character." Mont. R. Ev. 404(b). Here, a range of individuals, some of whom are not even identified, and many of whom had no apparent prior history with Has The Pipe, allegedly engaged in retaliatory adverse actions, yet their involvement in the prior illegal discrimination was at most peripheral and perhaps non-existent. The possibility of retaliatory action because of prior illegal discrimination is not enough to establish the actuality of retaliatory action.

Has The Pipe failed to establish the second element of his prima facie case–the actual occurrence of adverse acts (harassment and stalking) after his complaint–and the Rule precludes using the prior illegal discrimination to presume the subsequent alleged discrimination. Because his evidence fails on this element, there can be no finding of retaliation.

3. Damages for Illegal Denial of the Right to Work in the City-County Building

The department awards damages for illegal discrimination which include any reasonable measure to rectify any harm that resulted to Has The Pipe. Mont. Code Ann. § 49-2-506(1)(b). The purpose of a damage award in a discrimination case is to make the victim whole. *P. W. Berry v. Freese* (1989), 239 Mont. 183, 779 P.2d 521, 523; *Dolan v. Sch. Dist. No. 10*, 195 Mont. 340,

636 P.2d 825, 830 (1981); ***accord***, *Albermarle Paper Co. v. Moody* (1975), 422 U.S. 405, 95 S.Ct. 2362.[14]

By proving discrimination, Has The Pipe established a presumptive entitlement to lost wages. *Albermarle Paper Company*, ***supra at*** 417-23. He must prove the amount of wages he lost, but not with unrealistic exactitude. *Horn v. Duke Homes, Division of Windsor Mobile Homes, Inc.* (7th Cir. 1985), 755 F.2d 599, 607; *Goss v. Exxon Office Sys. Co.*(3rd Cir. 1984), 747 F.2d 885, 889; *Rasimas v. Mich. Dept. of Mental Health* (6th Cir. 1983), 714 F.2d 614, 626 (fact that back pay is difficult to calculate does not justify denying award). Has The Pipe found a better-paying job before the end of September 2003. Thus, he lost 2 or 3 weeks of wages. The hearing examiner used the lower number, awarding 2 weeks of lost wages at 40 hours for each week.

Has The Pipe did not suffer from any further lost wages, past or future, as a result of the illegal discrimination. He is entitled to prejudgment interest on his lost income. *P. W. Berry, Inc.*, ***op. cit.***, 779 P.2d ***at*** 523; ***see also*** *Foss v. J.B. Junk* (1987), HRC Case No. SE84-2345.

Emotional distress is compensable under the Human Rights Act. *Vainio v. Brookshire* (1993), 258 Mont. 273, 852 P.2d 596. The standard for such awards derives from the federal case law. ***See*** *Vortex Fishing Systems,* ***op. cit. at*** ¶ *33*:

> For the most part, federal case law involving anti-discrimination statutes draws a distinction between emotional distress claims in tort versus those in discrimination complaints. Because of the "broad remunerative purpose of the civil rights laws," the tort standard for awarding damages should not be applied to civil rights actions. *Bolden v. Southeastern Penn.Transp. Auth.* (3d Cir. 1994), 21 F.3d 29, 34; ***see also*** *Chatman v. Slagle* (6th Cir. 1997), 107 F.3d 380, 384-85; *Walz v. Town of Smithtown* (2d Cir. 1995), 46 F.3d 162, 170. As the Court said in *Bolden,* in many cases, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of common law torts." 21 F.3d at 34 (***quoting*** *Carey v. Piphus* (1978), 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252). Compensatory damages for human rights claims may be awarded for humiliation and emotional distress established by testimony or inferred from the circumstances. *Johnson v. Hale* (9th Cir. 1991), 940 F.2d 1192,

[14] As already noted, the Montana Supreme Court has approved the use of analogous federal cases in interpreting the Human Rights Act. *Harrison v. Chance* (1990), 244 Mont. 215, 797 P.2d 200, 204; *Snell v. MDU Co.* (1982), 198 Mont. 56, 643 P.2d 841.

1193. Furthermore, "the severity of the harm should govern the amount, not the availability, of recovery." *Chatman,* 107 F.3d at 385.

Exactly as in *Johnson v. Hale* and *Foss*, the evidence regarding the acts of discrimination and Has The Pipe's testimony, his demeanor as well as his words, established the basis for an award of damages for emotional distress. The evidence of emotional distress here is stronger than in those cases, because the egregious nature of the discrimination is deeper. The perpetrator here is government itself, which has its powers to protect its citizens. An appropriate recovery here is $15,000.00, rather than the $2,500.00 awarded in *Foss* or even the $3,500.00 awarded in *Johnson*[15] for lesser degrees of emotional distress. Here, the county struck at Has The Pipe's livelihood because of his race, and Has The Pipe recognized the underlying discriminatory basis for this adverse action. His substantial emotional distress was patent.

V. Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over the complaint. Mont. Code Ann. § 49-2-509(7).

2. **Park County** and **Pete Adams** discriminated against **Bryan Has The Pipe** in employment because of race or national origin in barring him from working in the City-County building in September 2003 without good cause. **Park County** neither discriminated against **Bryan Has The Pipe** in public services because of race or national origin nor retaliated against him because he filed and pursued a human rights claim against it for employment discrimination. Mont. Code Ann. §§ 49-2-301, 49-2-303(1)(a) and 49-2-308.

3. Respondent Pete Adams' participation in the discrimination was within the scope of his immediate authority as senior deputy on duty and was subsequently ratified and adopted by Park County. Monetary relief to Has The Pipe should therefore be imposed against the county. Affirmative relief extends to employees of the sheriff's department, which includes Adams.

4. Park County owes Has The Pipe $680.00 for lost wages, $15,000.00 for emotional distress, and interest of $88.68 on the lost earnings to the date of this final decision. Mont. Code Ann. § 49-2-506(1)(b).

5. The law requires affirmative injunctive relief against the county to refrain from the discriminatory conduct, and to conform the future conduct of

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[15] In *Johnson v. Hale* (9th Cir. 1994), 13 F.3d 1351, the trial court award of $125.00 per plaintiff was set aside and at least $3,500.00 directed per plaintiff for emotional distress.

its agents and employees to the requirements of the Human Rights Act. Mont. Code Ann. § 49-2-506(1)(a).

VI. Order

1. Judgment is found in favor of charging party **Bryan Has The Pipe** and against respondents **Park County and Pete Adams** on the charges that they violated the Montana Human Rights Act when Adams initially and the county subsequently barred Has The Pipe for working for his employer on the premises of the City-County building because of Has The Pipe's race or national origin.

2. Judgment is found in favor of respondent **Park County** and against charging party **Bryan Has The Pipe** on the further claims that the county illegally discriminated against Has The Pipe by retaliating against him for filing a human rights complaint and discriminated against him in public services because of his race or national origin. Those claims are dismissed.

3. The department orders the county to pay to Has The Pipe $680.00 for lost wages, $88.68 as prejudgment interest on those lost wages and $15,000.00 for his emotional distress because of the illegal discrimination. Interest accrues on this final order as it would on a district court judgment, as a matter of law.

4. The department enjoins and orders the county and its agents and employees to cease and desist from considering race or national origin in deciding what individuals are or may be security risks for working after hours in the City-County building, whether for the county, its contractors or nay other employer. The department further orders that the county, within 60 days after this decision becomes final:

> (a) Submit to the Human Rights Bureau proposed policies to comply with the permanent injunction, including the means of publishing them to present and future employees, and adopt and implement those policies, with any changes mandated by the Bureau, immediately upon Bureau approval of them. The policies must include appropriate prohibitions against the enjoined discrimination as well as formal procedures and standards and designation of the management persons responsible for identifying and verifying individuals whose access to secure areas of the City-County building constitute security risks prior to denying such individuals access.
>
> (b) Obtain training in race and national origin discrimination under Montana law for its agents and law

enforcement employees, including the current commissioners and sheriff and all law enforcement personnel within the sheriff's office. The duration and specifics of the training are subject to the approval of the Human Rights Bureau. Within the prescribed time the county must submit to the Bureau a plan for the training and implement that plan, with any changes mandated by the Bureau, immediately upon Bureau approval of it.

Dated: January 18, 2005

/s/ TERRY SPEAR
Terry Spear, Hearing Examiner
Montana Department of Labor and Industry

Has The Pipe FAD